

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0433, Craig W. Roche v. Virginia O'Neil, Trustee of Virginia O'Neil Revocable Trust, the court on August 16, 2006, issued the following order:

In this negligence action, the jury returned a verdict for the plaintiff, Craig W. Roche. On appeal, the defendant, Virginia O'Neil, trustee of the Virginia O'Neil Revocable Trust, contends that the trial court erred in: (1) admitting an unsworn, unsigned statement prepared for a subpoenaed witness who failed to appear for trial (witness); (2) excluding a prior inconsistent statement of the witness; and (3) denying defense counsel's request to read to the jury the witness's prior deposition testimony to show that he was incarcerated at the time of the deposition. We reverse and remand.

We review a trial court's rulings on the admissibility of evidence under an unsustainable exercise of discretion standard. State v. Francoeur, 146 N.H. 83, 86 (2001). Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted in the statement; it is inadmissible unless it falls within one of the exceptions to the hearsay rule. Id. Although the plaintiff cites New Hampshire Rule of Evidence 804 as support for the trial court's ruling, he does not argue, nor does the record support, that the witness was unavailable as defined in that rule. We therefore confine our analysis to Rule 803.

Rule 803(24) authorizes the admission of hearsay if it is a statement not specifically covered under the exceptions set forth in Rule 803 but has equivalent circumstantial guarantees of trustworthiness. Id. "Trustworthiness is the foundation upon which Rule 803(24) rests." State v. Johnson, 145 N.H. 647, 650 (2000).

In this case, the accident took place in June 2003. In early July 2003, the witness spoke with an insurance investigator; the interview was transcribed. In December 2004, the witness met with counsel for the plaintiff. Counsel for the plaintiff prepared a document labeled "affidavit" and presented it to the witness at his pretrial deposition in January 2005. The statement conflicted with the earlier interview on facts material to the plaintiff's claim. The witness never signed the statement and at the pretrial deposition stated that he did not remember speaking with plaintiff's counsel. He also responded "No" when asked: "Do you have any reason to believe that this is not an accurate - - an accurate recount of my conversation with you?" That response alone, however, was insufficient to imbue the statement with the circumstantial guarantees of trustworthiness required for admission pursuant to Rule 803(24). The conflict

with the statement provided by the witness shortly after the accident, his failure to sign the affidavit and the length of time that had elapsed between the accident and its creation all deprived the statement of the requisite guarantees of trustworthiness. It was therefore error to admit the statement under Rule 803(24).

The plaintiff asserts that any error committed by the trial court was harmless. We disagree. We have examined the record and cannot conclude that the error was “trivial, or formal, or merely academic,” McIntire v. Lee, 149 N.H. 160, 167 (2003), and that it did not affect the outcome. Id.

Because we reverse on this ground, we need not address the remaining issues, as they will not arise on remand in the same procedural posture.

Reversed and remanded.

BRODERICK, C.J., and DALIANIS and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**